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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1293

CLYDE R. GOAD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, union officers, contend that the court of appeals erred in allegedly holding that intent was not an element of the crime of embezzlement of union funds; that the district court erred in precluding them from introducing evidence which they claim would have negated their intent to embezzle; that the government was required to prove that the embezzled funds were not used to benefit the union, even though the funds were appropriated in the form

of unauthorized salary increases for petitioners; and that the appropriations of the union funds were ratified and approved by the membership in general expenditure resolutions which did not mention salary expenditures, although the union constitution requires that all salary increases be approved by the union executive board.

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioners were convicted of embezzlement of union funds, in violation of 29 U.S.C. 501(c). Each petitioner was convicted of three counts of embezzlement through the unauthorized receipt of each of three different salary increases. In addition, petitioner Lane, the president of the union, was convicted of abetting the other three in each of their embezzlement counts. Lane was sentenced on the three embezzlecent counts to concurrent terms of imprisonment for two years, subject to the early parole eligibility provisions of 18 U.S.C. 4208(a)(2), to be followed by concurrent three-year terms of probation on the nine abetting counts. Petitioners Goad and Ryan were each sentenced to concurrent terms of 18 months imprisonment on two of their embezzlement counts, with the first six months to be served in jail and the remainder on probation; sentence was suspended on the third embezzlement count, and they were placed on three years' probation to commence after service of the former sentences. Petitioner Mahany was sentenced to two concurrent terms of imprisonment for two years, subject to the early parole eligibility

provisions of 18 U.S.C. 4208(a)(2); sentence was suspended on the third embezzlement count, and he was placed on two years' probation to commence after service of the former sentences. The court of appeals affirmed in a comprehensive opinion (Pet. App. A1-A15).

The facts are set forth fully in the opinion of the court of appeals (Pet. App. A2-A5). The evidence showed that on three different occasions petitioners, officers of a local Teamsters union, granted themselves salary increases of $50 a week each. The constitution of the union (Section 7.02(b)) required that the executive board of the union "[a]pprove the salaries * * * for officers * * *." Petitioners' salary increases were not approved by the executive board of the union, and the general membership of the union did not specifically authorize or approve them. Indeed, petitioners admit (Pet. 4) that the general membership was never specifically informed of the salary increases.

Petitioners' main defense was that the salary increases were authorized by general expenditure resolutions passed each month by the membership.[1] At trial petitioners offered to prove that the salary increases were justified by increased hours of work; that the increases were comparable to those received by union members in various jobs in industry; that the increases brought petitioners' salaries up to the levels of other local union officers; and that the in-

[1] The text of the relevant resolution appears at p. 9, *infra*.

creases were fairly earned, on an equitable or *quantum meruit* basis, or that petitioners believed them to be so earned. The offers of proof were rejected by the district court upon the government's objection (Pet. 4-5).

1. Petitioners' contention (Pet. 6-7) that the court of appeals held that intent was not an element of the crime of embezzlement of union funds is erroneous. The court specifically held that "fraudulent intent to deprive the union of its funds" is one essential element of a violation of Section 501(c) (Pet. App. A13). This holding is consistent with the instructions on specific intent that the trial judge gave the jury (T. 739-740).[2]

In noting that "[a] union official cannot be acting in 'good faith' when not following his union's own procedures for authorizing expenditures" (Pet. App. A14, n.10), the court of appeals was not reading the intent requirement out of the statute, but was only holding that, "under the circumstances of this case" (*ibid.*), good faith would not have been shown by petitioners' belief that their unauthorized expenditures would benefit the union. Indeed, petitioners do not contend that there was insufficient evidence of fraudulent intent. Moreover, the court of appeals stated (Pet. App. A11-A12): "We think that the Government sufficiently proved a submissible case by demonstrating that the officers fraudulently intended to deprive the Union of its funds by taking

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[2] "T." refers to the trial transcript.

unauthorized salary increases, that is, by knowingly taking increases not authorized according to the Union's constitution and bylaws."

2. Petitioners argue (Pet. 7-8) that the district court erred in precluding them from introducing evidence that they claim would have negated fraudulent intent. The evidence they offered, however, would only have supported petitioners' contention that they believed the pay raises were deserved and were fair in amount. It would not have established that petitioners believed they had the right to appropriate the union funds without authorization by the executive board, and it would not have negated their fraudulent intent in circumventing the precise, constitutionally mandated procedures to obtain such increases. Accordingly, the evidence was properly excluded. On petitioners' theory, any embezzler who honestly believed he deserved the money he took would have to be acquitted. This position is unsupportable.[3]

3. Petitioners' contention (Pet. 8-10) that the government was required to prove lack of benefit to the union was fully considered and properly rejected by the court of appeals (Pet. App. A5-A14), on whose opinion we rely. The court correctly stated:

> The statute, cases, and legislative history clearly establish that union officers are fiduci-

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[3] The cases cited by petitioners (Pet. 7) are inapposite. They consider the types of relevant evidence that may be introduced to negate criminal intent; none holds that irrelevant evidence may be so introduced.

aries for union members, and a willful misappropriation of union funds by officials constitutes a violation of § 501(c). * * * [Pet. App. A8.]

* * * * *

If the Government establishes fraudulent intent and lack of proper authorization, it should not also be saddled with an additional burden of proving lack of benefit to the union. To do so would emasculate the Act. Aside from the difficulties of proving a negative fact, such as lack of union benefit, we do not think that Congress intended that union funds be the fair subject of embezzlement that is only vaguely premised on claimed union benefit. The conduct of these defendants cannot by any stretch of the imagination or by the use of sophisticated semantics be raised to the level of conduct required of fiduciaries, who at common law and in the ordinary context of that term are charged with a high degree of integrity and candor in their dealings with fiduciary funds, together with strict proscriptions against self-dealing.

Section 501(a) specifically says that a fiduciary responsibility includes expending union funds "in accordance with its constitution and bylaws." The overall purpose of the Act is to protect union property and funds, to provide full disclosure of financial affairs of the union, to establish self-help remedies for union members, and to impose criminal sanctions under § 501(c). The unauthorized expenditures of union funds with a fraudulent intent alone is exactly what the Act was attempting to reach. The purpose of the Act was "to insure that full information concerning the financial and internal adminis-

trative practices and procedures of labor organizations" is available to union members. The exercise of power by union officials is not unfettered, but checked in the first instance by proper approval within its own ranks. The salary increases, which were not approved by the Executive Board, effectively were kept secret until the second reelection of defendants. Section 501(c) was designed to reach this exact type of occurrence. * * * [Pet. App. A12-A13.]

* * * * *

We, therefore, hold that the essential elements of a § 501(c) crime in this case are: (1) fraudulent intent to deprive the union of its funds and (2) lack of authorization according to the union's constitution and bylaws. * * * [Pet. App. A13.]

* * * * *

To hold that "lack of union benefit" must be affirmatively proved by the prosecution and to allow a showing of union benefit to vitiate fraudulent intent in a case involving unauthorized expenditures would allow union officials to handily evade the broad fiduciary provisions of § 501(c) and the essential elements of § 501(c) violation. * * * [Pet. App. A14.]

Contrary to petitioners' claim, the court of appeals' decision does not conflict with the Second Circuit's decision in *United States* v. *Silverman*, 430 F. 2d 106. In that case all members of the panel assumed, consistently with the decision in the present case, that a conviction under Section 501(c) may be based on proof of fraudulent intent "and *either* a lack of bona

fide authorization *or* an absence of [union] benefit." 430 F. 2d at 117, 127 (emphasis supplied). The panel was divided over whether the evidence was sufficient to show lack of authorization. The court in the present case thus correctly concluded (Pet. App. A11) "[w]e certainly cannot say that the Second Circuit has established lack of union benefit as an essential element of a § 501(c) offense."[4]

We note also that, while absence of union benefit is not an element of the offense, the circumstances of this case would not support a claim of union benefit. The money that petitioners appropriated went into their own pockets; it was not used by or for the union or the membership. It was certainly not used to purchase petitioners' services as officers, because petitioners agreed to provide those services at the original salaries by accepting the offices to which they were elected.

Petitioners' example of the hypothetical union president who purchases emergency picket signs without express authorization (Pet. 9) is inapposite. He would be guilty of a crime only if his acts were done with a "fraudulent intent to deprive the union of its funds" (Pet. App. A13).

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[4] In *United States* v. *Vitale*, 489 F. 2d 1367 (C.A. 6), upon which petitioners also rely, the court upheld the conviction of a union officer who purchased an automobile from the union at $1,200 to $1,400 less than its market value. The court did not hold that a lack of union benefit is an essential element of the crime where the expenditure is unauthorized.

4. Petitioners contend (Pet. 10-11) that the general expenditure resolution passed by the membership each month authorized or ratified the pay raises. The resolution stated (Pet. App. A4-A5):

> [T]he President and Secretary-Treasurer have the authority which is hereby confirmed, verified, and extended to make such expenditures and use of Teamsters Local 600 funds and facilities to whatever extent they believe is related to the interests and benefit of Teamsters Local 600 without any prior approval.

The court of appeals correctly held (Pet. App. A5):

> [T]his general resolution cannot be read as rescinding the specific constitutional provision requiring Executive Board approval of salary increases. To do so would defeat the provisions of the Union's constitution. * * *

The cases cited by petitioners (Pet. 10) do not hold that courts are bound by the union officers' interpretation of the union's constitution. Quite the opposite is true; those cases hold that courts will not be bound by the union officials' interpretation where it is not fair and reasonable. It would not be a fair and reasonable interpretation of the general resolution to hold that it rescinded the specific constitutional pro-

vision designed to protect union treasuries from the very misappropriations which took place in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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